1965

Daisy Helen Kinsley, Sometimes Known as Helen D. Kinsley, Individually and as Executrix of the Estate of Otho v. Kinsley, Also Known as Otho Verne Kinsley, Deceased v. Lewis H. Larsen and Dorothy G. Larsen, His Wife, Individually, and Doing Business As Larsen Enterprises and Belco Petroleum Corporation : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

DAISY HELEN KINSLEY, sometimes known as HELEN D. KINSLEY, Individually and as Executrix of the Estate of Otho V. Kinsley, also known as Otho Verne Kinsley, Deceased,
Plaintiff & Appellant,

v.

LEWIS H. LARSEN and DOROTHY G. LARSEN, his wife, Individually, and doing business as LARSEN ENTERPRISES and BELCO PETROLEUM CORPORATION, a corporation,
Defendants & Respondents.

Case No. 10339

APPELLANT'S BRIEF

Appeal from the Summary Judgment of the Third District Court for Salt Lake County Before Honorable A. H. Ellett, District Court

Verl C. Ritchie
Of MOYLE & MOYLE
810 Deseret Building
Salt Lake City, Utah
Attorneys for Appellant

George E. Ballif
Of BALLIF & BALLIF
84 East 100 South
Provo, Utah
Attorneys for Respondent Belco Petroleum Corporation

H. H. Halliday
400 Executive Building
Salt Lake City, Utah
Attorneys for Respondents Lewis H. and Dorothy G. Larsen and Larsen Enterprises

TABLE OF CONTENTS

CASES AND AUTHORITIES

Cases Cited

Texts and Annotations

IN THE SUPREME COURT OF THE STATE OF UTAH

DAISY HELEN KINSLEY, sometimes known as HELEN D. KINSLEY, Individually and as Executrix of the Estate of Otho V. Kinsley, also known as Otho Verne Kinsley, Deceased,
Plaintiff & Appellant,
v.
LEWIS H. LARSEN and DOROTHY G. LARSEN, his wife, Individually, and doing business as LARSEN ENTERPRISES and BELCO PETROLEUM CORPORATION, a corporation,
Defendants & Respondents.

Case No. 10339

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to recover monies wrongfully paid by defendant Belco Petroleum Corporation to defendant Lewis H. Larsen as purported agent of plaintiff, and misappropriated by him, in connection with the purchase of oil and gas interests by defendant Belco Petroleum Corporation.

DISPOSITION IN THE LOWER COURT

Prior to trial, on motion of defendant Belco Petroleum Corporation, Summary Judgment was granted against plaintiff in favor of Belco Petroleum Corporation dismissing plaintiff's Complaint as to it (R 72, 73). The issues have not been resolved as between plaintiff and other respondents.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Summary Judgment dismissing plaintiff's Complaint as to respondent Belco Petroleum Corporation, and judgment in her favor as a matter of law.

STATEMENT OF FACTS

Otho V. Kinsley, a resident of Tucson, Arizona, prior to his death on March 28, 1962, was the owner of an undivided one-half interest in certain royalties and working interests under two State of Utah oil and gas leases on lands in San Juan County, Utah (R 2, 29, 60). The defendants Lewis H. Larsen and Dorothy G. Larsen, his wife, were owners of the other undivided one-half interest (R 3, 13, 29). This action is brought by plaintiff as the widow and executrix of the estate of Otho V. Kinsley to recover part of the proceeds from the sale of the parties' interests totalling $384,000.00 paid by the defendant Belco Petroleum Corporation to defendant Lewis H. Larsen, as agent, without authority on March 22, 1962, and deposited to his account under the name of Larsen Enterprises (R 2, 3, 11-14, 29). Under date of March 31,

1962, Larsen remitted $92,000.00 to Kinsley in Tucson, and withheld the sum of $100,000.00 due Kinsley (R 3, 7, 29). On August 6, 1963, subsequent to the filing of the suit and attachment, the sum of $22,400.11 was paid to plaintiff by Larsen but the balance of the $100,000.00 was never turned over to decedent or plaintiff (R 4a, 29). The defendant Lewis H. Larsen concedes that he owes plaintiff the sum of $77,599.89, plus interest, but the defendant, Dorothy G. Larsen, denies that she is a partner in Larsen Enterprises, or that she is liable (R 4a, 29).

Pursuant to a motion under Rule 56, U.R.C.P., Summary Judgment dismissing plaintiff's complaint against Belco Petroleum Corporation was entered on March 3, 1965, after the court concluded that the following telegram sent by Otho V. Kinsley, the deceased, to Lewis H. Larsen on February 12, 1962, constituted an appointment of Larsen as the agent of Kinsley to sell the mineral interests and to receive payment from Belco Petroleum Corporation (R 72, 73):

> Pursuant to our telephone call this evening, this will be your authority to dispose of our interest at not less than $160,000.00 or any amount greater for which you dispose of your interest.
>
> Otho V. Kinsley

On or about March 16, 1962, the defendant, Belco Petroleum Corporation, without notice to, or prior approval of deceased or plaintiff, entered into an agreement with the defendant Lewis H. Larsen under the terms of which Belco agreed to pay direct to Larsen, as agent, the total sum of $384,000.00 in payment of the

respective interests of the Kinsleys and the Larsens in and to the oil and gas leases in question (Ex. 10, Deposition of Lewis H. Larsen, taken at the instance of defendant Belco). No notice was given to Kinsleys by Belco Petroleum Corporation, or its attorneys, that such agreement was entered into, or of the amount agreed upon for the sale of said interests or of the fact that Belco intended to make payment to Lewis H. Larsen, as agent (R 66), although Belco Petroleum Corporation and its attorney repeatedly sent many legal documents to Otho V. Kinsley for execution and return in connection with sale after the agreement and prior to payment to Larsen (R 50, 65, 66). Kinsleys returned the various documents to Larsen, who then delivered them to Belco (R 50). No formal power of attorney authorizing the defendants Lewis H. Larsen or Dorothy G. Larsen, his wife, or Larsen Enterprises to act as agent in dealing with the property or for receipt of the money for the plaintiff or deceased was ever delivered or recorded in the office of the County Recorder of San Juan County, Utah, pursuant to the provisions of Section 57-1-8, Utah Code Annotated, 1953 (R 4a, 29).

Previously, on about November 2, 1960, defendant Lewis H. Larsen had advised Belco Petroleum Corporation (hereinafter referred to as Belco) to make all payments for moneys due Kinsleys under the leases to them in Tucson, Arizona (R 5, 30). Under date of March 7, 1961, Belco sent certain clarification documents to the deceased Otho V. Kinsley, together with an oil division order which was signed and returned to defendant Belco Petroleum Corporation requiring payment for oil runs to

be made to the Kinsleys, and the Kinsleys in fact periodically received the proceeds of their share of the royalty and other payments under the leases direct from Belco at all times prior to March 26, 1962 (R 65, 66, 67a). At no time prior to the payment by Belco Petroleum Corporation to Lewis H. Larsen, as agent, did Belco or L. E. Eggertsen, as its attorney, or Lewis H. Larsen, or anyone, advise the plaintiff or the deceased that the proceeds of the sale of the oil interests were to be paid to Lewis H. Larsen, as agent (R 65, 66). Nor did Belco advise plaintiff or the deceased that it was entering into an agreement with Lewis H. Larsen, under the terms of which Larsen was to be paid the moneys due the Kinsleys for their interests in and to the oil leases in question (R 66). Neither plaintiff, nor the deceased, were parties to the purported agreement of March 16, 1962, referred to in the affidavit of L. E. Eggertsen, attorney for Belco (Ex. 10, Deposition of Lewis H. Larsen).

The defendant Larsen admits payment by Belco to him on March 22, 1962 (R 2, 29) but Larsen, in a letter dated March 26, 1962, to the deceased Otho V. Kinsley said: "It appears that the deal will be closed for the full amount of $192,000.00." (R 6) Lewis H. Larsen, without advising the decedent Kinsley of the fact that the money already had been paid by Belco direct to him, he (Larsen) requested a loan from Kinsley of $100,000.00 for the purpose of buying 1,000 head of cattle (R 6). Otho Kinsley died in Tucson, Arizona on March 28, 1962, two days after the above letter was dated at Salt Lake City by defendant Lewis H. Larsen (R 6, 60). The bank stamps on the reverse side of the

drafts from Belco show without question that the same were deposited by defendant Lewis H. Larsen, to his account at Walker Bank & Trust Company on or prior to the 26th of March, 1962 (R 56-57a).

Under the date of March 31, 1962, at least three days after the death of Otho V. Kinsley, Lewis Larsen forwarded from Salt Lake City a letter addressed to Kinsley, enclosing a check for $92,000.00 and a promissory note for $100,000.00 dated April 2, 1962 (R 3, 4, 7, 8). The promissory note was not accepted by the deceased or the plaintiff (R 4, 29), but was retained as evidence of the indebtedness (R 63).

There is nothing in the record to indicate that Kinsley had any knowledge of the representations made by Larsen to Belco, if any, of the scope of his authority or agency.

The agreement referred to in the counter-affidavit of plaintiff between Larsen and Belco dated March 12, 1962 is the same agreement as that referred to in the affidavit of L. E. Eggertsen between Larsen and Belco as having been dated March 16, 1962 (R 50, 66). This latter date is the correct date.

Upon plaintiff's objection to the competency of the defendant Lewis H. Larsen as a witness under Section 78-24-2(3), U.C.A. 1953, the court on the hearing of the Motion for Summary Judgment refused to consider testimony in his deposition pertaining to statements of the deceased Otho V. Kinsley or transactions with the decedent. The deposition was taken at the instance of the defendant Belco and formal objections were made

prior to the hearing (R 68). Plaintiff made a motion to strike the affidavit of Lawrence Ruben in support of the Motion for Summary Judgment (R 70, 71).

ARGUMENT

POINT 1

THE DEFENDANT LEWIS H. LARSEN WAS NOT, AS A MATTER OF LAW, AUTHORIZED TO RECEIVE PAYMENT OF THE SALES PRICE OF THE PROPERTY, AS AGENT, AND SUCH DID NOT CONSTITUTE PAYMENT TO PRINCIPAL.

The primary issue in this case is whether the telegram from decedent Otho V. Kinsley dated February 12, 1962, to the defendant Lewis H. Larsen in light of the other evidence and the inferences to be drawn therefrom at the time of the hearing on the Motion for Summary Judgment, constituted sufficient authority, as a matter of law, for Belco Petroleum Corporation to pay the purchase price for Kinsley's property to the defendant Lewis H. Larsen as agent.

The other facts and propositions established by the record are:

1. No proof has been adduced that an express agency existed authorizing Larsen to receive payment as agent.

2. That the deceased Otho V. Knisley was a record owner along with Larsen of an undivided one-half interest in the royalty and working interests in the oil and gas leases involved (R 29).

3. That Belco had made uninterrupted royalty and other payments under the exact leases involved in this sale direct to the deceased Otho V. Kinsley in Tucson, Arizona prior to the sale (R 66).

4. That neither Belco nor its attorneys advised plaintiff or the deceased that the purchase price in question was to be paid to Lewis H. Larsen as agent (R 66), even though Belco and its attorney corresponded with the Kinsleys and repeatedly forwarded documents of conveyance and assignments to them to be executed personally in connection with the transaction (R 65, 50).

5. That the plaintiff or deceased had no knowledge that Belco had entered into the agreement of March 16, 1962, with the defendant Lewis H. Larsen, under the terms of which payment was to be made direct to Larsen (R 66).

6. That defendant Lewis H. Larsen was admittedly not a general agent with full powers as evidenced by the requirement that deceased and plaintiff sign and execute all documents of conveyances in favor of Belco, and Kinsleys then returned the executed documents to Lewis H. Larsen (R 50).

7. That Lewis H. Larsen advised Belco in 1960 that payments in connection with the oil and gas leases due the Kinsleys should be sent directly to him in Tucson, Arizona (R 5) in accordance with the usual and customary practice of payments to a record owner of an oil interest (R 30).

8. That on March 7, 1961, approximately one year before the sale, Belco requested a division order to be

signed in connection with one of the leases, which order required payments to be made by Belco direct to the deceased Kinsley (R 65).

9. That no formal and complete power of attorney was executed and delivered by Kinsley to Larsen, or recorded (R 4a, 30).

10. That defendant Lewis H. Larsen had been paid by Belco and deposited the checks from Belco to his account at the time he wrote Kinsley requesting a loan and has never turned over the balance of $100,000.00 to plaintiff (R 2, 6, 29, 56, 57a).

There existed under these circumstances at most a limited agency authorizing Larsen to negotiate for a sale of the mineral interests in question pursuant to the terms of the telegram of February 16, 1962. It is, of course, a general rule that any doubt as to the authority of an agent to do a particular act is to be resolved against the agent and those dealing with him. Further, any such power and the authority granted must be strictly construed and not extended by construction. (*2 C.J.S. Agency, Sec. 114(bb) page 1328).*

Otho V. Kinsley and Lewis H. Larsen were co-tenants under the oil and gas leases in question. It is well settled in Utah that one co-tenant can make no agreement affecting the interest of another in a property jointly owned and that such co-tenants are not agents or partners by virtue of their joint interests. *Garner v. Anderson, (1926) 67 Utah 553 at page 563, 248 P. 496.* It has been held that such co-ownership is the antithesis of principal and agent relationships becuause the

parties are equal in status and ownership. *Parker v. McCartney (1959) 216 Ore. 283, 388 P. 2d 371.*

Belco was not compelled to deal with Larsen. As a matter of fact, it dealt jointly with Larsen and Kinsley but in so choosing to deal with and pay Larsen as an agent, it must take the risk and deal with such an agent at its peril. Here the loss to plaintiff and decedent never would have occurred had Belco properly performed the duty imposed upon it by law to investigate the authority of the agent with whom it was dealing. The loss could have been averted by notice to the decedent that Belco intended to pay Larsen as agent, or by the simple business-like procedure of making the checks payable jointly to the record owners of the interest, i.e., both Kinsley and Larsen. In any event, Belco assumed the risk of ascertaining the scope of Larsen's powers at its peril. The oft repeated rule is well stated in *1 Mechem on Agency (2d Ed.) Sec. 743, page 527:*

> An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to 'stop look and listen.' It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it.

It is important to bear in mind that Belco did not rely on Larsen as a general agent and Kinsley and plain-

tiff were personally required to execute all documents and conveyances in connection with the transfer (R 50, 65). If Belco had recognized Larsen as an agent with other than limited powers, but clothed with the necessary authority to do any and all things necessary to complete the sale and execute the documents of conveyance, there would have been no need for Belco and its attorneys to require the deceased and plaintiff to execute the documents of conveyance, but admittedly Larsen had no authority to sign the same as attorney-in-fact on behalf of Kinsley.

The agency was limited and could not be enlarged by the representations of Larsen. There existed no express agency for Larsen to receive payment from Belco and any self-serving representations of Larsen whereby he apparently induced Belco to enter into the agreement with him to pay him the proceeds of the sale, could not enlarge the express authority contained in the telegram from Kinsley. Such power is to be strictly construed, and any doubt as to the scope of the power to do a particular act is to be resolved against the agent and those dealing with him. This court, in accordance with well established general rules, in the case of *Dohrmann Hotel Supply Co. v. Beau Brummel, Inc. (1940) 99 Utah 188, 103 P. 2d 650,* held that the defendant could not rely on the representation of the agent that he could make a settlement when the authority granted by a telegram was limited, and that it was the duty of the party dealing with the agent to ascertain just what his authority and capacity is.

To appellant's knowledge, there are no controlling

Utah cases. The case of *Olsen v. Tholen* (1927) 111 Utah 241, 177 P. 2d 75 involves payment to a seller's agent. But in that case the listing contract specifically authorized the agent to accept a deposit on the purchase price and in the event of forfeiture to the buyer, to retain, out of the sum forfeited an amount equal to his commission, and so it is no authority in the instant case.

The prevailing view and weight of authority is that authority to sell or to negotiate a sale, does not carry with it the right to receive from the purchaser the purchase price, or any part thereof. This rule is set out in *2 C.J.S. Agency, Sec. 107, page 1276* as follows:

> A mere authority to contract for the sale of realty, unaccompanied by power to convey, carries with it no authority to collect the purchase price; and a mere power to deliver a conveyance and receive the consideration does not entitle the agent to receive payment thereof, particularly to his own use; but the language of the appointment, or the conduct of the principal in the light of surrounding facts and circumstances, may extend the agent's powers sufficiently for them to embrace authority to receive payment of the purchase money.

Here the surrounding facts and circumstances, such as Belco's dealing with Kinsley as principal after the date of the telegram and the uninterrupted prior payments by Belco to the Kinsleys actually negate any extension of the scope of authority, and clearly shows that defendant Lewis H. Larsen was not, as a matter of law, authorized to receive payment of the sales price of the property, as agent, and such payment did not constitute payment to the principal.

The comment to the Restatement of Agency, Sec. 53, states that unless the price and other terms have been completely stated by the principal, the normal inference is that an agent authorized "to sell" land and not given a formal power of attorney, is authorized merely to find a purchaser. See *30 A.L.R. 2d 810, Sec. 5* and cases cited therein in favor of the following general rule:

> It is generally held or stated that a real estate broker, under the ordinary contract of employment, giving him authority merely to produce a purchaser willing to contract with the seller upon the terms prescribed, or a broker or other agent whose authority is specifically limited to finding a purchaser for the property, or who is authorized simply "to sell" the property, or to negotiate its sale, has no implied authority, in the absence of additional circumstances, to receive from the purchaser the purchase price, or any part thereof.

In the case of *Lynn v. Northern Federal Loan Association (1952) 235 Minn. 484, 51 N.W. 2d 588, 30 A.L.R. 2d 799,* it was held that the broker's authority to sell property is ordinarily not inclusive of the right to receive the purchase money therefor on behalf of his principal, and payment to him does not constitute payment to the principal in the absence of an express or implied authorization. The Supreme Court of Minnesota, in affirming judgment for the plaintiff, held under circumstances similar to those present in the instant case that the agent was not, as a matter of law, authorized to receive payment, and that the question had properly been submitted to the jury.

POINT II

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT AGAINST THE DEFENDANT BELCO PETROLEUM CORPORATION AS THE EVIDENCE DOES NOT SUPPORT A FINDING OF AGENCY, EITHER EXPRESS OR IMPLIED, AS A MATTER OF LAW, SUFFICIENT TO AUTHORIZE BELCO TO PAY THE SALES PRICE OF THE PROPERTY TO THE DEFENDANT LARSEN AS AGENT, WITHOUT NOTICE OR PRIOR APPROVAL OF PLAINTIFF.

A Summary Judgment is supported only by a showing that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. This court has repeatedly held that in determining the sufficiency of such a showing, the burden is upon the moving party and the evidence and inferences therefrom must be considered in a light most favorable to the party against whom the judgment is sought.

Apparently the trial court, in deciding the motion, considered only the aspects of the case most favorable to Belco. The basis for the court's ruling was that the telegram constituted sufficient authority as a matter of law for Larsen to sell the interests and to receive the purchase price (R 73). This is untenable in view of the holding of most courts that authority to sell does not carry with it the right to receive the purchase price, and particularly in view of all other facts and circumstances.

The burden was upon Belco to show that no genuine issues of fact existed and that it was entitled to judgment as a matter of law. Further, Belco had the burden of ascertaining the scope and extent of the agency and having raised such a defense, the burden is upon it to prove that Larsen had authority to receive the payment of the proceeds. In the absence of a showing of express authority the scope of such authority is an issue of fact for jury determination. The party making the payment to an agent is required to prove by a preponderance of the evidence that the agent had the authority, express or implied, to receive payment on behalf of the principal. This court has repeatedly followed the familiar rule from *Goddard v. Lexington Motor Co. 63 Utah 161, 165, 223 P. 340,* that the existence or nonexistence of such agency is a question of fact for the jury:

> When any evidence is adduced tending to prove the existence of a disputed agency, its existence or nonexistence is as a general rule a question of fact for the jury, aided by proper instructions from the court, even though the evidence is not full and satisfactory, and in such cases it is error for the court to take the question from the jury by directing a verdict by instruction, by non-suit, or by sustaining a demurrer to the evidence.

Justice Crockett, in his concurring opinion in *Holland v. Columbia Iron Mining Co. (1956) 4 Utah 2d 303, 293 P. 2d 700,* at *page 311* of the *Utah Reports,* summarized the approach a trial judge should take in ruling upon a motion for summary judgment. Likewise, Justice Wade, in an opinion dissenting in part in the same case,

at *pages 316* and *317* of the *Utah Reports,* outlined in some detail the considerations which should be properly made before Summary Judgment is granted.

While the facts in the instant case are much stronger for reversal than in the *Holland* case, these opinions are particularly controlling in this case. The trial court in the instant case exceeded its authority in granting judgment against appellant, thereby wrongfully depriving her of her right to trial. Certainly when properly viewed in accordance with all applicable legal principles, reasonable minds would make findings that would make out a cause of action against Belco Petroleum Corporation on plaintiff's claim. The evidence and all reasonable inferences therefrom would much more logically support a Summary Judgment in favor of appellant than Belco.

POINT III

GENUINE ISSUES OF MATERIAL FACTS EXIST AS TO WHETHER THERE WAS AGENCY, EXPRESS OR IMPLIED, OR APPARENT, SUFFICIENT FOR DEFENDANT BELCO PETROLEUM CORPORATION TO RELY ON PAYMENT TO LARSEN AS AGENT OF THE DECEASED.

It is respectfully suggested that if this court now applies the tests set forth in the opinions of Justice Wade and Justice Crockett in *Holland v. Columbia Iron Mining Company, supra,* there could be no question but that there are genuine issues of material facts sufficient to warrant the submission of the case to a jury. There is a "genuine issue as to any material fact" unless all facts which affect the rights or liabilities of the parties are

so conclusively shown that there is not the slightest doubt thereon, and in order to sustain such a judgment, such facts must show that the moving party is entitled to a judgment as a matter of law. See opinion of Justice Wade in *Holland v. Columbia Iron Mining Company, supra.* The court, in deciding such a motion must consider all evidence and inferences to be drawn therefrom in the light most favorable to the appellant. It is plaintiff's position that there is no valid legal basis upon which the judgment of the trial court can be sustained.

There is absolutely no evidence of direct authority from Kinsley to the defendant Lewis H. Larsen to receive the cash for the sale of the mineral interests. It has been shown that Kinsleys dealt directly with the attorney for Belco and personally executed all documents and assignments in connection with the conveyance and transfer and that the attorney for Belco, while corresponding with the Kinsleys immediately prior to the time of the transfer, did not advise the Kinsleys of the fact that Belco had entered into an agreement with Larsen, under the terms of which it intended to pay Larsen, as agent, for Kinsleys' property, nor of the fact that it intended to pay Kinsley. The Kinsleys were entitled to believe that payment would be made directly to them by Belco inasmuch as they had been receiving all royalty and other payments direct from Belco on the property involved for some time prior to March, 1962. Further, the defendant Larsen admitted payment by Belco to him on March 22, 1962, (R 2, 29). Larsen, in a letter dated March 26, 1962, indicated to Kinsley that "it appears the deal will be closed for the full amount of $192,000.00," after he

had already received the money from Belco and deposited the same to his account at Walker Bank & Trust Company (R 56, 57a). When considering these facts in light of the *Goddard* case, *supra,* and the general rule of law that ordinarily such an agent does not have authority to receive payment, there can be no question but that the matter should have been submitted to a jury and that he jury could reasonably and properly find a verdict in favor of the plaintiff.

If in fact the payments of the royalties and other amounts due under the leases prior to March of 1962, had been paid to the Larsens without objection by Kinsleys, such would have been evidence of implied authority to receive the purchase price. *But here the contrary situation exists* (R 66) and the fact that Belco was paying the royalty and other payments due under the leases direct to the Kinsleys prior to March, 1962, is competent evidence that Belco did not intend, as far as Kinsley was concerned, to rely upon the Larsens as an agent and that Larsen was in fact not an agent for the purpose of receiving payments of any kind under the lease or of payment of the purchase price.

In order to establish an inference of such authority, the conduct of the agent must be known to the principal and reasonably relied on by the third party. The record is absent of any showing that the Kinsleys had any knowledge whatsoever of any misrepresentations of Lewis H. Larsen to Belco as to his authority. It has been repeatedly held that knowledge of representations of an agent outside the scope of his authority, cannot be imputed to the principal. Under the facts at bar if anyone

was misled, it was the decedent Kinsley and plaintiff, and certainly not Belco.

The fact that the actual documents of conveyance and assignments were referred back to Lewis H. Larsen in Salt Lake City is not conclusive under any circumstances of his authority to receive the purchase price, but is merely one of the facts to be weighed and considered by a jury in determining the scope of authority of such an agent. *Campbell v. Gowans, (1909) 35 Utah 268, 278, 280, 100 P. 397.*

Belco was under an aboslute legal duty to inquire into and prove the extent of authority or limitations thereon as far as Larsen was concerned. Whether Belco was justified in relying upon the scope of the agency or the apparent authority of Larsen at most, presented a further question for jury determination. It is respectfully submitted that the Summary Judgment should not have been granted as the evidence does not preclude all reasonable possibility that appellant could establish a valid claim at a trial. On the contrary, under the overwhelming weight of authority, and without exception, the cases examined show that jury verdicts under similar circumstances have been upheld on appeal.

POINT IV

NO FORMAL POWER OF ATTORNEY WAS EXECUTED OR RECORDED AND THE DEFENDANT BELCO PETROLEUM CORPORATION, AS A MATTER OF LAW, COULD NOT RELY ON THE REPRESENTATIONS OF LARSEN AS TO

THE SCOPE OF THE AGENCY AND WAS BOUND TO ASCERTAIN THE LIMITATIONS THEREOF.

There can be no question but that the overriding royalty and working interest in the oil and gas lease constitute an interest in real estate. No power of attorney was executed or recorded pursuant to *57-1-8, Utah Code Annotated, 1953.* This statute requires a power of attorney to be acknowledged and recorded in order that a third party, such as Belco, may rely on the authority of an agent to act in any matter whereby an interest in real property may be affected.

Appellant contends that Belco, in addition to being put on notice of the limitations of the agency as a matter of law, was bound by the requirements of the statute relating to powers of attorney before it could, with impunity, deal with Larsen as an agent, particularly without notice to Kinsley.

The ruling of this court in the case of *Malia, State Bank Commissioner, et al, v. Giles, et al, 100 Utah 562, 114 P. 2d 208,* supports this proposition that as a matter of law Belco had no authority under the circumstances to make payment to Larsen as agent.

The *Malia* case involved the question of the "apparent authority" of an agent to pledge the principal's property. The court held that the extent of an agent's apparent authority is not measured by the extent of power exercised by the agent; but by the principal's conduct with reference to the power exercised by the agent, and that a course of conduct creating an apparent authority in an agent embraces only those matters which

are incident to such course of conduct. In determining what may or may not be included as incidents of that conduct, the court said that it should not overlook the requirements of the law as it may by statute or otherwise be made applicable to such conduct.

Under the *Malia* case, a greater duty was placed upon Belco to ascertain the limitations upon Larsen's agency, in view of our statute which requires a power of attorney to be acknowledged and recorded before one may deal with a party as an agent whereby any real property is affected. This is particularly true in view of the fact that Belco made all payments for rentals and royalties from the property in question direct to the Kinsleys for many months, and, inasmuch as Belco and its attorneys corresponded with and sent all deeds, assignments, etc. to the Kinsleys for signature, thereby leading Kinsleys to believe they would receive payment direct as they were accustomed to. Under such circumstances the court should rule, as a matter of law, that Belco could not rely on the representation of Larsen to any extent, and that the Kinsleys were entitled to believe that payment of the purchase price would be made to them.

POINT V

THERE IS NO EVIDENCE TO SUPPORT THE FINDING THAT OTHO V. KINSLEY EXECUTED AND DELIVERED TO LEWIS H. LARSEN ASSIGNMENTS OF ALL HIS INTEREST IN THE MINERAL LEASES.

Paragraph 2 of the Summary Judgment reads as follows:

> That prior to March 22, 1962, Otho V. Kinsley executed and delivered to Lewis H. Larsen assignments of all his interest in and to Utah Mineral Lease Nos. 13692 and 8366 (R 72).

It is difficult to determine from the reading of the above finding made by the trial court whether the court was confused or misled. In any event, the finding is ambiguous and misleading in that it infers that Kinsley executed and delivered assignments of his interest in the leases in favor of Lewis H. Larsen. Such is absolutely contrary to fact as all of the assignments and documents of conveyance were executed in favor of Belco Petroleum Corporation and no claim has been made otherwise (R 50, 65). Even paragraph 15 of the affidavit of Lawrence Ruben states that the documents of transfer were duly executed by Otho V. Kinsley and Mrs. Kinsley (R 53, 54).

Paragraph 3 of the Findings, to-wit, "that Lewis H. Larsen did deliver the assignment of Otho V. Kinsley unto the attorney for the defendant Belco Petroleum Corporation, and was delivered in exchange for said assignment two drafts totaling $384,000.00 made payable to "Lewis H. Larsen, as agent." is also susceptible of a double meaning and ambiguous. Paragraph 3 when read in connection with paragraph 2 indicates that the court found that the assignments were executed in favor of Larsen who then delivered the same to Belco and received the checks. This is absolutely contrary to the facts and these is no evidence to support such findings.

The findings assure Belco that the facts most favorable to it appeared as official findings of the court, but

ignore most other material facts, from which different inferences may be drawn. The fact that the documents of conveyance and assignment in favor of Belco were returned to Larsen by Kinsley is not conclusive of the question on agency and authority but is a matter of evidence to be weighed and considered in connection with all of the facts and circumstances in evidence. See *Campbell v. Gowans, supra.*

CONCLUSION

Appellant respectfully submits that the trial court erred in granting a Summary Judgment dismissing the plaintiff's Complaint as against Belco. The cases, almost without exception, hold that under the circumstances of the case the defendant Lewis H. Larsen could not have been authorized, as a matter of law, to receive the payment of the sales price of the property as agent and such payment does not constitute payment to the principal. Under the basic and fundamental rules of agency, Belco was charged with the absolute duty of inquiry as to the scope of Larsen's purported authority and in dealing with Larsen under the circumstances did so at its peril. The loss to the decedent and appellant never would have occurred had Belco properly performed this duty. The loss could have been avoided merely by notice to the decedent by Belco that it intended to pay Larsen as agent, or by simply making the checks payable jointly to both Kinsley and Larsen, the record owners of the interests, in accordance with normal and customary business methods.

Under cases too numerous to mention, it is clear

that the trial court exceeded its authority in holding that there were no genuine issues of fact and that Belco was entitled to a judgment as a matter of law. The evidence, which was largely uncontroverted, and all reasonable inferences to be drawn therefrom, would much more logically support a judgment in favor of appellant than Belco. At most, the questions concerning the scope of the agency were issues for jury determination and not for arbitrary and summary decision based on incomplete affidavits and counter-affidavits.

The judgment of the trial court was wholly erroneous and should be reversed reinstating plaintiff's Complaint against Belco Petroleum Corporation.

Respectfully submitted,

MOYLE & MOYLE
By Verl C. Ritchie
810 Deseret Building
Salt Lake City, Utah